

Exhibit 6

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 HERMES INTERNATIONAL and
5 HERMES OF PARIS, INC.,

6 Plaintiffs,

7 - against -

8 MASON ROTHSCHILD,

9 Defendant.

10 Civil Action No.: 22-CV-00384

11 -----X

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13
14 REMOTE PROCEEDINGS

15 DAVID NEAL, PhD

16 WEDNESDAY, SEPTEMBER 21, 2022

17 4:45 P.M.
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23 Reference No.: NY 5462232

24 Reported By: Rita Persichetty
25

1 A P P E A R A N C E S:

2 (All appearances via Veritext Virtual)

3

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25

1 A P P E A R A N C E S:

2 ALSO PRESENT:

3 VALENTINE FADIE, ESQ, In House Counsel, Hermes

4

5 Tom Keighley, Videographer

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1 ----- I N D E X -----

2 WITNESS EXAMINATION BY PAGE

3 DAVID NEAL, PhD MS. WILCOX

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6 -----INFORMATION/DOCUMENTS REQUESTED-----

7 PAGE 24 Any invoices from Ms. Rodman

8

9 ----- EXHIBITS -----

10 DESCRIPTION FOR I.D.

11 Exhibit 146 Invoice to Lex Lumina 28

12 Exhibit 147 Testimony of 56

13 defendant's expert

14 witness David Neal,

15 PhD

16 Exhibit 138 Expert Report of Dr. 67

17 Isaacson

18 Exhibit 140 Chapter on Likelihood 80

19 of Confusion Surveys

20 Exhibit 148 Expert Report of 94

21 Melissa Pittaolis

22 Exhibit 142 Chapter of a book 118

23 Exhibit 143 Isaacson Full Data 150

24 File

25 Exhibit 144 File entitled 154

09Isaacson000093.xlsx

----- EXHIBITS -----

DESCRIPTION

FOR I.D.

Exhibit 141

Psychological

170

Considerations in

Designing Trademark

and False Advertising

Survey Questionnaires

1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: All right. Good
3 morning [sic]. We're going on the record.
4 The time is approximately 4:41 on
5 September 21, 2022.

6 Please note that this deposition is
7 being conducted virtually. Quality of
8 recording depends on the quality of the
9 camera and the Internet connection of
10 participants. What is seen from the
11 witness and heard on the screen is what
12 will be recorded.

13 Audio and video recording will
14 continue to take place unless all parties
15 agree to go off the record.

16 This is media unit number 1 of the
17 video recorded deposition of Dr. David Neal
18 and we're here in the matter of Hermes
19 International, et al. versus Mason
20 Rothschild.

21 This deposition is being conducted
22 remotely using virtual technology. My name
23 is Thomas Keighley representing Veritext
24 and I'm the videographer. Our court
25 reporter is Rita Persichetty also with

1 Veritext.

2 I'm not related to any party in this
3 action nor am I financially interested in
4 the outcome.

5 Any objections to proceeding please
6 state them at the time of your appearance.

7 Counsel and all present, everyone
8 attending remotely, can now state their
9 appearance and affiliation for the record
10 beginning with the noticing attorney.

11 MS. WILCOX: This is Deborah Wilcox of
12 the law firm of Baker and Hostetler
13 representing the plaintiffs Hermes
14 International and Hermes of Paris. I have
15 with me Lisa Gehman from our Philadelphia
16 office.

17 MR. MILLSAPS: And this is Rhett
18 Millsaps with Lex Lumina PLLC representing
19 defendant, Mason Rothschild. I have with
20 me my colleague Chris Sprigman.

21 THE VIDEOGRAPHER: Good. And if I
22 could ask the court reporter to please
23 swear in the witness and we can proceed.

24 D A V I D N E A L, PHD,

25 called as a witness, having been sworn

1 by the Notary Public, was examined and
2 testified as follows:

3 EXAMINATION BY

4 MS. WILCOX:

5 Q. Thank you.

6 Good morning your time, Dr. Neal.

7 Could you please state your full name
8 for the record?

9 A. Certainly. It's David Thomas Neal,
10 N-E-A-L.

11 Q. What is your home address.

12 A. It's 615 Vilabella Avenue, Vilabella
13 is one word, V-I-L-A-B-E-L-L-A, Avenue, Coral
14 Gables 33146, that's in Florida.

15 Q. What is your work address?

16 A. That's the same.

17 Q. Where are you located today?

18 A. Let me just turn off my Bluetooth.

19 Okay. You can still hear me?

20 Q. Yes.

21 A. Okay. My computer tried to connect to
22 my Bluetooth speakers.

23 Could you repeat the question?

24 Q. Where are you located today?

25 A. I'm in Australia. I'm in a hotel in

1 deposition, and then obviously the preparation
2 for this deposition and the deposition itself.

3 Q. What do you intend to charge for that
4 work?

5 A. That being?

6 Q. What you just described that you
7 haven't yet billed.

8 A. Okay. In -- in combination all of
9 those things?

10 Q. Yes.

11 A. Well, assuming that I use the flat
12 rate, I would estimate that might be another --
13 let me just think. Maybe somewhere in the order
14 of \$9,000.

15 Q. I believe we have just received a copy
16 of the invoice that you sent to Lex Lumina.

17 MS. WILCOX: Ms. Gehman, could you
18 pull that up.

19 And is this going to be Exhibit 146?

20 MS. GEHMAN: Yes. Bringing it up
21 right now. Thank you for bearing with me.

22 MS. WILCOX: Thank you.

23 (Exhibit 146, Invoice to Lex Lumina,
24 marked for identification.)

25 Q. Dr. Neal, is this your invoice to Lex

1 Lumina?

2 A. Yes, it is.

3 Q. Thank you.

4 What was the understanding of your
5 assignment in this case?

6 A. I would characterize it as reviewing
7 the scientific validity and reliability of
8 the -- the surveys that Dr. Isaacson conducted
9 and his report in its totality.

10 Also reviewing the nature of the
11 conclusions that he drew from the data that he
12 collected and reaching an opinion based upon
13 that review as to whether his studies were
14 scientifically proper and whether his
15 conclusions validly and logically flow from the
16 data that he collected. And then articulating
17 that -- the results of that analysis in a
18 rebuttal report.

19 Q. Did you consider conducting any
20 surveys of your own?

21 A. Briefly I did consider that.

22 Q. What did you consider?

23 A. Well, I -- I considered the scope to
24 run an Eveready survey as a rebuttal survey.

25 Q. What do you mean the scope?

1 A. Well, I -- I briefly considered, I did
2 not pursue it very far after conversations with
3 counsel, but I -- I briefly considered whether
4 there was time and what the broad outline of an
5 Eveready survey might be in this particular
6 case.

7 Q. And what were the reasons for choosing
8 not to do a survey of your own?

9 A. Two primary factors. One is that my
10 understanding is that the defendant did not have
11 the funds to pay for a survey. Obviously
12 surveys are expensive. And so my understanding
13 is there just wasn't enough money to fund a
14 survey?

15 And secondly, my understanding --
16 obviously I'm not an attorney, but my
17 understanding is that the burden falls on the
18 plaintiff to prove confusion. And having
19 reviewed Dr. Isaacson's survey and reaching a
20 conclusion that that burden scientifically had
21 not been met, in my view, a survey was
22 unnecessary.

23 Q. You have run surveys for defendants
24 accused of intellectual property infringement in
25 the past; is that correct?

1 A. I certainly have done that in the past
2 that's right, yes, when the budgets allowed for
3 it.

4 Q. In fact, you did one for Walmart.
5 Does that ring a bell?

6 A. Yes. And Walmart -- Walmart is
7 obviously a very well funded entity.

8 Q. And you also did a survey for Evofem
9 Biosciences; is that correct?

10 A. I -- I did. I need to confirm if they
11 were the defendant. And they, again, are a
12 large pharmaceutical firm.

13 Q. Well, your survey was in the nature of
14 a rebuttal likelihood of confusion survey?

15 A. I'd need to check, but it's -- it's
16 certainly possible, yes.

17 Q. And you also did a survey for a case
18 that was Solid 21 versus Richemont and
19 MontBlanc; is that correct?

20 A. That is correct.

21 Q. And another one for the case Solid 21
22 versus Breitling, and that one you represented
23 Breitling; is that correct?

24 A. That's correct.

25 Q. And the same -- I forgot to ask you

1 about Richemont and MontBlanc. You represented
2 those parties in that case; is that correct?

3 A. Yes. Again, all -- all very large
4 international multinational firms.

5 Q. How much time would you want to have
6 to conduct an Eveready survey for this case?

7 A. Well, how much time I would want to
8 have would typically be a minimum of six weeks,
9 sometimes that's not possible and it can be done
10 faster, but that would be a -- a -- a
11 comfortable minimum, in my view.

12 Q. What is the shortest period of time in
13 which you have ever conducted an Eveready
14 survey?

15 A. I don't -- I wouldn't be able to
16 recall that with accuracy. It's -- it's I think
17 faster than six weeks but I -- I wouldn't be
18 able to give you an accurate answer to that.

19 Q. Beyond receiving Dr. Isaacson's report
20 and the pleadings you mentioned in this case,
21 did you request any additional materials from
22 Lex Lumina?

23 A. Well, I'm not sure that your question
24 encompasses this, but obviously I requested
25 certain data sets that were admitted from

1 Q. Well, we will go through that in
2 further detail.

3 A. I'm sure.

4 Q. So --

5 A. That was a lot.

6 Q. I know. I understand you have
7 identified these five, what you call, flaws in
8 the survey.

9 Is there anything else on which you
10 are opining in this case?

11 A. There -- there -- it's possible there
12 may be. I don't know what I'll be asked. I
13 don't know what this possible supplementary or
14 supplemental report might include, but I can't
15 think of anything else now.

16 Q. Okay. Let's go to your actual --

17 MR. MILLSAPS: Deborah, I just want to
18 note we've been going a little over an hour
19 now, it might be a good time to have a
20 short break.

21 MS. WILCOX: Okay. Can we take a
22 break for five minutes, does that work for
23 everyone?

24 MR. MILLSAPS: Is that sufficient for
25 you, Dr. Neal?

1 THE WITNESS: Sure, that works.

2 MR. MILLSAPS: Okay.

3 MS. WILCOX: Okay. See you in five.

4 THE WITNESS: Okay.

5 THE VIDEOGRAPHER: Let's go off the
6 record. The time is 5:45 and we're going
7 to go off the record.

8 (Short recess taken)

9 THE VIDEOGRAPHER: Okay. The time is
10 approximately 5:52 and we are back on the
11 record.

12 Q. Dr. Neal, we'd like you to look at
13 your report, which I understand you have a copy
14 of in front of you. And though for the record
15 we will pull it up, and I believe it is
16 Exhibit 137? Yes.

17 Do you see the report on your screen?

18 A. I do.

19 Q. Yes. And it's 40 pages long.

20 Does that sound right?

21 A. Including my CV? Yes.

22 Q. Yes.

23 A. That's right.

24 Q. Okay. Very good.

25 I'd like to direct your attention to

1 paragraph 3.2.4 of your report. Which I believe
2 is page 9.

3 Do you see that section?

4 A. I do.

5 Q. Yes. And you say, "Setting aside the
6 other flaws documented in this report, I note
7 that Dr. Isaacson's approach on this issue is
8 not inherently flawed if one only seeks to know
9 the combined effect of all four elements of
10 alleged infringement."

11 Is that still your opinion today?

12 A. Yes, it is with respect to that one
13 flaw in isolation, yes.

14 Q. And you agree, don't you, that a
15 survey stimulus must replicate market
16 conditions?

17 MR. MILLSAPS: Objection.

18 A. Well, there's -- there's a general
19 goal of replicating market conditions as closely
20 as possible, but it's well acknowledged that no
21 survey, just by virtue of the fact that it is a
22 survey, is a perfect replication of market
23 conditions. But I would -- I would agree with
24 you that a general goal is to, as much as
25 possible, replicate market conditions.

1 Q. And defendant, Mason Rothschild, in
2 this case is -- is the one who chose to use the
3 plaintiff's trademark Birkin so many times on
4 MetaBirkins.com; isn't that right?

5 MR. MILLSAPS: Objection.

6 A. I don't know who made that decision.

7 Q. If you go -- have you gone to the
8 website MetaBirkins.com?

9 A. Yes.

10 Q. And you saw the trademark Birkin
11 there? I believe you mentioned that earlier in
12 the summary of one of your opinions.

13 A. I saw the name Birkin there, yes.

14 Q. How many times?

15 A. I didn't count.

16 Q. Do you recall the different ways in
17 which the MetaBirkins.com web page uses the
18 Birkin trademark?

19 A. I know that it is embedded in a -- a
20 phrase "not your mother's Birkin." And then I'm
21 not sure whether part of your allegation is that
22 it's -- it's used within the name MetaBirkin,
23 but if that is your allegation then that, and
24 taking that at face value, then it's there as
25 well.

1 A. Correct.

2 Q. Okay, thank you.

3 Actually, let's look at your testimony
4 from that case.

5 MS. WILCOX: Ms. Gehman, if you could
6 pull up the PODS Enterprises versus U-Haul
7 International testimony. We'll need to
8 mark this as an exhibit.

9 MS. GEHMAN: One moment.

10 (Exhibit 147, Testimony of defendant's
11 expert witness David Neal, PhD, marked for
12 identification.)

13 Q. Do you recall providing testimony in
14 the PODS versus U-Haul case in the Middle
15 District of Florida?

16 A. Yes, I do.

17 Q. It's dated September 18, 2014?

18 A. That seems about right.

19 Q. We're showing you Exhibit 147.
20 Testimony of defendant's expert witness David
21 Neal, PhD.

22 MS. WILCOX: And if you could please
23 scroll to the next page.

24 Q. Do you keep copies of your transcripts
25 from trial testimony?

1 A. Not -- not typically.

2 Q. Have you ever seen your trial
3 testimony in this case?

4 A. I don't believe so. It's -- it's
5 possible that I saw it many years ago, but I
6 don't have any recollection.

7 MS. WILCOX: And if you can look at
8 page 3 of that. There where it says near
9 the bottom, "That's right."

10 Yes, thank you.

11 Q. And so you were -- you were testing to
12 create a real world naturalistic scenario. And
13 if you recall, you told people you'd be looking
14 at a web page, and you showed them an actual web
15 page from U-Haul; is that correct?

16 A. That's correct.

17 MS. WILCOX: And if you can turn to
18 page 5 of the testimony.

19 Q. We're in the top quarter of the page.
20 When I asked you about whether your goal was to
21 ask about the overall impression from looking at
22 the website, you said you didn't remember that,
23 but I'm going to point you to this testimony you
24 gave. And you see the question:

25 "So you asked -- when viewing this web

1 page, did you consider asking something more
2 specific like, look for the word 'pod' and tell
3 me what you think?

4 "Answer: I did consider that but that
5 would have been, again, inappropriate. That's
6 not the -- that would have moved people into a
7 style of thinking about a website that you don't
8 normally engage in. When we open a web page we
9 look at the whole web page. Our eye scans where
10 it naturally scans. There is not something that
11 makes us zoom into one particular word. So our
12 goal here was to ask a question about what the
13 overall impression from looking at the website
14 is."

15 Does that refresh your recollection
16 about the testimony that you gave?

17 A. Yes, but I'm -- I'm not giving a --
18 that -- in that sentence there I'm not
19 describing the -- the judgment that I asked
20 people subsequently to make, which is an
21 association -- the specific construct that I was
22 measuring in that survey was association.

23 I'm making the point here that when I
24 was showing people the website I didn't want to
25 direct their attention anywhere in particular I

1 wanted them just to have whatever overall --
2 natural overall impression they normally would
3 have.

4 Q. And Dr. Isaacson did the same thing in
5 his survey with his test, isn't that right,
6 showing the MetaBirkins.com web page?

7 A. That's not the -- the problem. He did
8 do that but he failed to use different
9 versions -- he -- he could have very simply
10 solved this problem and kept what you are
11 rightly pointing out is the goal of a
12 naturalistic survey.

13 He could, for example, have created
14 multiple conditions, one where he just changed
15 "not your mother's Birkin" to "not your mother's
16 handbag," but he kept Hermes and he kept the
17 trade dress. He could have -- that would have
18 been even more naturalistic, to use your term,
19 than the control which removed everything.

20 Secondly, he could have created
21 another condition where he just removed Hermes
22 and he kept Birkin, MetaBirkin and the trade
23 dress. He could have created a version where he
24 just changed the trade dress. Those would have
25 been different conditions. They all would have

1 been more naturalistic than his actual control,
2 which removed everything, and that would have
3 enabled him to meet this goal of having a
4 naturalistic design while also being able to
5 draw a scientific -- scientific inference that,
6 oh, the Hermes mark by itself is driving this
7 amount of confusion. The Birkin mark by itself
8 is driving this amount of confusion.

9 So you're right that there is a
10 general goal to be naturalistic. However, he
11 also needed -- that doesn't give him an excuse
12 for confounding the influence of the four
13 factors allegedly driving confusion. And he
14 could have created a perfectly naturalistic
15 design, one that's in fact more naturalistic
16 than the one he did, because less would be
17 changing from the real world, and met what I'm
18 saying -- solved what I'm saying is this fatal
19 flaw.

20 Q. Well, if you were assigned to look at
21 the combined effect of all the four elements of
22 the uses of Birkin and Hermes and the others as
23 you mentioned in -- in this case, what would you
24 have done differently in designing the survey?

25 MR. MILLSAPS: Objection.

1 additional evidence that comes in the form of Q4
2 that the person is affirmatively thinking of
3 Hermes. And the way you know that is that they
4 mention at least some goods or services put out
5 by the senior user. Person 108 has not done
6 that.

7 Q. Is it your opinion that if a
8 respondent used the term "MetaBirkins" that that
9 shows no confusion?

10 A. Well, it's not -- it doesn't -- it's
11 not a good -- MetaBirkin, as I understand it, is
12 not a good put out by Hermes. You can correct
13 me if I'm wrong about that, but that's my
14 understanding.

15 Q. That, of course, is one of the
16 questions in the case is whether people are
17 confused when they see MetaBirkins.

18 So are you -- you give it -- if you
19 recall, Dr. Isaacson scores MetaBirkins as not
20 the same as someone answering Birkin, but he
21 still gives them a code that counts towards some
22 level of confusion, and you're saying that
23 should be given absolutely no weight?

24 MR. MILLSAPS: Objection.

25 A. I think if someone just repeated

1 MetaBirkins and said nothing else related to
2 Hermes, that would not be -- even setting aside
3 this issue of the other products, that would not
4 be sufficient evidence that the person was
5 confused and thinking of Hermes.

6 Q. Have you seen any court require this
7 follow-on question that you are describing in
8 this section of your report?

9 A. Well, depends on what you mean by
10 require. I -- I mean the original Eveready
11 survey, which I think was -- I think the
12 plaintiff lost that at the district level and
13 then the circuit court, if memory serves,
14 overturned that and affirmed the survey. So
15 that obviously is -- is one.

16 I -- I am not aware, although I
17 wouldn't be because I don't track these legal
18 dimensions of things, I would not necessarily be
19 aware of a court rejecting this one way or the
20 other. You know, rejecting someone who failed
21 to do this. I don't know that, but I haven't
22 investigated that, I haven't researched that.

23 I know that whenever I encounter this
24 issue, including with, you know, very prominent
25 law firms who run a lot of surveys like this,

1 this issue always comes up, and -- in
2 circumstances like this, and this is the
3 standard approach that I have consistently seen.
4 And I have never -- I have never seen someone
5 ask this question and then -- in circumstances
6 like this, and then fail to use the data in the
7 manner that I'm saying is logically appropriate,
8 supported by authoritatively treatises and was
9 used in the original Eveready itself.

10 Q. Although you have been critiqued for
11 doing that very thing at least in the Growmark
12 case. Have you been --

13 A. But as -- as we saw, the -- the expert
14 there was clearly wrong in her interpretation of
15 what Jerre Swann discussed. I -- I have -- you
16 asked me initially, have you discussed this
17 issue with Jerre Swann, and I said no. I have
18 discussed this issue in the past at great length
19 with -- with his longest term collaborator who's
20 published multiple times with him, and I know
21 that what I'm saying is consistent with the way
22 that Jerre Swann thinks about this issue, at
23 least as understood by his longest term protege
24 and co-author.

25 Q. Who is?

1 least the person who wrote this in the website
2 believes MetaBirkins to be?

3 MR. MILLSAPS: Objection.

4 A. I don't know that I'm qualified to
5 make an inference about what the person who
6 wrote this believes. That's certainly the
7 language that appears here. Of course, there's
8 also an image of the artwork, so people are not
9 just reading a text-based description, they're
10 also seeing a picture.

11 So those things collectively I -- I
12 think would help people understand what it is
13 that's being sold. But certainly that
14 expression that you asked me to read is -- is
15 here on the page.

16 Q. You take issue with Dr. Isaacson
17 asking the respondents -- I should have the
18 exact -- using the term "item," right. And
19 let's in fact go back to his survey so we can
20 read the question that he asked.

21 And that would be in paragraph 43.

22 A. Of his report?

23 Q. Yes.

24 A. Yeah.

25 Q. So yes, you have your copy there,

1 Dr. Neal.

2 MS. WILCOX: And Ms. Gehman is
3 scrolling as fast as she can to paragraph
4 43.

5 MS. GEHMAN: I haven't found a faster
6 way.

7 MS. WILCOX: I know. Okay, thank you.

8 Q. Okay. So as Dr. Isaacson says in 43,
9 "Next, the survey among NFT purchasers asked
10 questions to measure confusion, starting with
11 confusion as to source. Question one asked,
12 what company, companies, person or people do you
13 think makes or provides the items shown on the
14 web page. Be specific -- sorry, be as specific
15 as possible. If you don't know, please select I
16 don't know."

17 And you take issue with his use of the
18 word "items" to refer to the MetaBirkins NFTs;
19 is that right?

20 A. Correct.

21 Q. What word would you have chosen if you
22 were conducting the survey?

23 A. I haven't reflected on that deeply. I
24 didn't need to do that obviously for my
25 rebuttal, and I was -- since I wasn't designing

1 my own survey. I think that he needed to use
2 some language that made it clear whether he was
3 referring to the NFT or to the real world
4 physical object depicted in the NFT, which I
5 understand the plaintiff alleges is a Birkin
6 bag.

7 So any language I think that would
8 successfully do that, it might -- potentially,
9 I'd have to reflect on it some more, but it
10 might be something like provides the NFT shown
11 on the web page. That would help
12 disambiguate -- that would help clarify for
13 respondents that they were being asked not about
14 the real world item that might be depicted but
15 the actual NFT itself.

16 Q. But you didn't do anything to actually
17 test that selection of verbiage for question
18 one; is that right?

19 A. Well, as I explained, the defendant
20 didn't have -- doesn't have the money, as I
21 understand it, to -- for a survey, and because
22 the burden falls on the plaintiff there wasn't
23 really scope to do that.

24 But I don't need to do a survey to
25 know that using the language "items" is

1 ambiguous, and that if I show you a picture of
2 something and I say what is the item shown, a
3 reasonable speaker of English might think oh,
4 it's whatever is depicted in the picture or they
5 might think it's a reference to the picture
6 itself. That doesn't require a survey that's
7 good survey design using language that doesn't
8 have multiple ambiguous interpretations.

9 Q. Well, if I told you Dr. Isaacson used
10 the term "items" so as not to lead the
11 respondents, would that change your opinion?

12 A. How would it be leading to use
13 language that correctly calls out the object
14 that he's asking people to offer an opinion
15 about?

16 Q. So you're saying you don't agree with
17 that, that wouldn't change your opinion?

18 A. I'm saying I don't see how an
19 alternative would be -- an alternative that
20 correctly identifies the object would be
21 leading.

22 Q. Did -- did Lex Lumina provide you with
23 the expert report that plaintiffs submitted in
24 this case from Dr Scott Kominers (phonetic)?

25 A. No.

1 Q. You've mentioned a few times NFT
2 artwork.

3 MS. WILCOX: And if we could look
4 again at that Exhibit 2. I just want to be
5 clear -- I'm sorry, we'll have to -- don't
6 look at the scrolling you'll get dizzy. I
7 already had to take some Tylenol.

8 Q. So we're going to Exhibit 2 which is
9 MetaBirkins.com, the best possible
10 representation that could be garnered of the
11 dynamic site.

12 Okay. There's no reference to the
13 word "artwork" on the web page; is that right?

14 Take your time.

15 A. Yes, I -- I don't see the word "art."
16 There is a -- a picture, which to me conveys
17 that what you're buying is the artwork, but the
18 word "art" does not appear here.

19 Q. Nor does the word "image"?

20 A. The expression "graphic execution" is
21 here, which is perhaps a synonym or art or an
22 image.

23 Q. Is that something that you are saying
24 is an expert or as a layperson as to that --

25 A. I'm saying really just as a speaker of

1 50 years. So the questions may not be very
2 different. It would depend on whether the facts
3 were different.

4 Q. And to be clear, 1960 to 2022, as I
5 happen to know having been born in 1963, is
6 approaching 60 years. And you said 20 but I
7 think you were looking at the time frame I
8 was -- I had prefaced.

9 A. Sorry, I was referring to the -- I
10 said 50 and I was referring to when the Eveready
11 survey was first adopted.

12 Q. Yeah.

13 A. So -- which I think was in the
14 mid-seventies, right.

15 Q. Yeah. I -- I had just started, like
16 if you were surveying the Andy Warhol
17 paintings --

18 A. I understand.

19 Q. Yeah, sorry.

20 A. An additional, yes. Slightly longer.

21 Q. Correct, yes.

22 A. Yes, I -- I don't see any reason why
23 those additional ten years would necessarily
24 change the nature of the survey. The survey
25 could be different depending on whether the

1 facts were different.

2 Q. Okay. I would like to go -- let's see
3 we are in your report, to your section on the
4 handbag survey. So let me get you to that
5 point. 3.5.

6 A. Okay.

7 Q. And I don't -- there's nothing in
8 particular to -- to look at, but just your
9 critique of the handbag survey, you are aware
10 that Dr. Isaacson is not offering an opinion
11 with respect to the data that he was collecting?

12 A. I'm aware that he -- he said that. I
13 think that's problematic, but I'm aware that
14 that's his position.

15 Q. And would you consider this to be a
16 forward confusion case?

17 A. Well, I think it's -- it's a matter of
18 what -- what you have alleged. I agree, I don't
19 recall now whether the complaint formerly uses
20 the language forward or reverse but the nature
21 of the claim I would imagine is -- is forward
22 confusion.

23 Q. And the survey on which Dr. Isaacson
24 opines is among the NFT purchasers. Would you
25 agree that that would be the proper universe to

1 survey?

2 A. Setting aside the other flaws I think
3 that, yes, the -- the most relevant universe for
4 forward confusion survey is typically likely
5 purchasers of the junior user's goods.

6 Q. Do you personally own any NFTs?

7 A. I do not.

8 Q. And have you ever made any study of
9 who comprises the NFT purchasing market?

10 A. I -- I can't -- we're -- we're veering
11 back into that area where there may be
12 confidential consulting engagements that fall
13 under that banner that I'm not in a position to
14 discuss. So I think I can say broadly I have
15 looked into that issue to some degree.

16 Q. Is there anything that you can reveal
17 with respect to that, any facts that you can
18 reveal?

19 A. I don't think so, unfortunately.

20 Q. Okay.

21 A. Sorry.

22 Q. No. I have learned a lot about NFTs
23 during this case but I still have not purchased
24 one, although I have been tempted to for a while
25 here.

1 Okay. So I'm not among those people
2 but I'm a potential -- a potential purchaser or
3 minter. I mean, they're different.

4 A. Okay.

5 Q. Okay. So I'd like to now go into this
6 coding issue that you raised with respect to the
7 excluded survey respondents. And for sake of
8 time, we'll just walk through it with respect to
9 the NFT purchaser study.

10 A. Okay.

11 Q. Okay. So first I just want to
12 understand what you mean by coding. You've
13 mentioned that a few times, that you didn't get
14 the coding.

15 What is it that you mean by coding
16 with respect to respondents?

17 A. Okay. So when Dr. Isaacson fielded
18 his survey, respondents went through and they
19 answered his questions as shown in his
20 questionnaire exhibit, right. So they end up
21 with a data -- an Excel file that's got, you
22 know, here's what person number one wrote for
23 question one, for question four, for question
24 seven, and there's a little text entry box in
25 there. And then here's a variable that reflects

1 more sensible answers than people he kept who
2 happen to be confused and in the test cell and,
3 therefore, helpful to the confusion number.

4 So there are some people who gave, you
5 know, quite nonsensical answers that he kept who
6 were helpful to the confusion number by
7 comparison to people who were removed who by
8 removing them were helpful to the denominator.
9 So it doesn't -- sorry, go ahead.

10 Q. Are you intending to issue a
11 supplemental report with respect to --

12 MR. MILLSAPS: I'm just going -- I'm
13 just going to object that you keep
14 interrupting Dr. Neal in the middle of his
15 answers.

16 MS. WILCOX: Well, his answers are
17 going beyond the question asked, and I am
18 trying to, in the interest of time, get
19 to --

20 Q. I don't mean to interrupt you if you
21 have something that you're trying to finish that
22 answers the question I asked. So if that's the
23 case, please let me know.

24 A. Okay.

25 So no, my -- my -- I may -- I'm not

1 sure at this time about issuing a supplemental
2 report. I -- I have to finish the analysis
3 first.

4 Q. Have you ever removed survey
5 respondents who take too little time in taking
6 the survey and are -- I think sometimes referred
7 to as speedsters or something along those lines?

8 A. I have done that before. I -- my
9 general practice is not to remove speedsters,
10 and sometimes the opposite are referred to as
11 laggards. I tend not to do that, but some
12 people do it and I don't think that it's
13 necessarily problematic to do it.

14 Q. And did you make note of the time
15 frames that Dr. Isaacson used to identify
16 speedsters and laggards in his reports?

17 A. Yes, I think it was less than two
18 minutes or more than an hour.

19 Q. That's right.

20 Do you take any issue with those time
21 frames?

22 A. No, I don't think so. I -- I probably
23 would have looked at the -- no, I don't think I
24 have an issue with that.

25 Q. Doctor, I'll represent to you that

1 Dr. Isaacson testified yesterday that he did the
2 calculations with respect to these 20 excluded
3 individuals to determine what the different
4 actual confusion percentage would be from the
5 one he put in his report, and he calculated it
6 to be 17.1 percent, namely a 1.5 percent lower
7 number than what he identified.

8 Do you have any reason to object to
9 that or comment on that or is that something
10 that you said you haven't yet calculated?

11 A. Yes, I haven't yet finished my review
12 of that so I don't know what -- what number I
13 will arrive at and whether it's different or the
14 same.

15 And I would say I presume in that
16 analysis that Dr. Isaacson didn't correct any of
17 the other issues, for example, he kept people
18 regardless of whether they identified the
19 plaintiffs' goods and he kept the person who
20 said in their open-ended answer that I'm -- I
21 recognize that the NFT is not affiliated with
22 Hermes.

23 Q. That's right, he did not accept your
24 recoding other than to include the excluded
25 individuals who he had identified as speedsters,

1 laggards or inattentive survey takers.

2 A. Understood.

3 Q. Do you remove respondents ever for
4 nonsensical responses when you conduct
5 likelihood of confusion surveys?

6 A. Yes, I do.

7 Q. What is your definition of
8 "nonsensical" in that context?

9 A. I mean, it depends a little bit on the
10 survey, you know, an Eveready versus a Squirt,
11 because in an Eveready the open-ended answers
12 are what gets coded. So my standard practice is
13 to -- you know, if someone gives answers that
14 indicate that they are really not paying
15 attention, like they have answered in a way that
16 is irrelevant to the question, those people
17 would typically be flagged.

18 But what I do is what I'm saying what
19 I believe Dr. Isaacson should have done, I
20 always flag those individuals but keep them in
21 the data, and I say, you know, of my sample size
22 of 400 people, 25 people gave nonsensical
23 answers, but here's the data from them and
24 here's the variable that identifies who they
25 are. And if you decide to include them in the

1 data, here's what the results are.

2 So I'm being transparent about it.
3 I'm handing over the full data. I'm handing
4 over the coding. I'm identifying who was
5 excluded and not excluded, and I'm typically
6 presenting the results in a way so that the
7 reader knows what is the number, whether the
8 person is included or not included. And that's
9 what I think is -- is the scientific standard.

10 Q. Is -- is that what the other survey
11 experts do with respect to identifying
12 individuals who provided nonsensical answers?

13 A. In my experience --

14 MR. MILLSAPS: Objection.

15 A. Yeah, I would say -- I'm sorry,
16 Rhett -- in my general experience that is what
17 other experts do. I don't -- I have never been
18 in a situation that I was here where these
19 people were omitted and that it was essentially
20 functionally refused to hand it over and then
21 eventually getting it after the report was
22 submitted. I've never personally experienced
23 that.

24 Q. When you are excluding respondents for
25 nonsensical answers, are you making those

C E R T I F I C A T E

STATE OF New York)

: ss

COUNTY OF RICHMOND)

I, RITA M. PERSICHETTY, a Notary Public within
and for the State of New York, do hereby certify:

That DAVID NEAL, PhD, the witness whose
deposition is hereinbefore set forth, was duly sworn
by me and that such deposition is a true record of
the testimony given by such witness to the best of
my ability.

I further certify that I am not related to any
of the parties to this action by blood or marriage;
and that I am in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto set my hand
this 26th day of September, 2022.



RITA M. PERSICHETTY